Filed 12/15/14 Gomez v. Superior Court CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| PEDRO JESUS GOMEZ,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF MONTEREY COUNTY,<br><br>Respondent;<br><br>THE PEOPLE,<br><br>Real Party in Interest. | H039679<br>(Monterey County<br>Super. Ct. Nos. HC4944, SS002126) |

Petitioner Pedro Jesus Gomez seeks a writ of mandate requiring all judges of the Superior Court of Monterey County (respondent) to recuse themselves from adjudicating his petition for a writ of habeas corpus, now pending in that court.

Petitioner is currently serving a sentence of 50 years in state prison following his conviction by jury trial for attempted murder and assault with a firearm. In his habeas petition, he alleges the trial prosecutor failed to disclose exculpatory evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). In response, the prosecutor filed declarations stating she provided the evidence to petitioner's trial counsel in pretrial

discovery. Petitioner's trial counsel filed declarations stating the prosecutor never provided the evidence to him.

After she filed her declarations, the prosecutor became a judge of the respondent court. Petitioner contends all judges of that court must now recuse themselves because adjudication of his *Brady* claim would require the judge hearing the claim to weigh a colleague's credibility. Petitioner argues section 170.1 of the Code of Civil Procedure provides statutory grounds for disqualification in this situation because "recusal would further the interests of justice" and "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ. Proc., § 170.1, subds. (a)(6)(A)(i) & (a)(6)(A)(iii).)[1] Respondent court filed a return by demurrer asserting that petitioner failed to follow the proper statutory procedures for recusal.

We conclude that the statutory scheme governing recusal does not set forth procedural grounds for seeking simultaneous recusal of all the judges of a superior court. We also conclude that petitioner's statement of disqualification was otherwise timely filed. Accordingly, we will sustain respondent's demurrer and deny the petition for a writ of mandate without prejudice to the filing in the superior court of a statement of disqualification of the individual judge assigned to adjudicate petitioner's *Brady* claim.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Underlying Offense*

The underlying offense involved a shooting outside an Applebee's in Salinas in 2000. (*People v. Gomez* (July 18, 2003, H022934) [nonpub. opn.].) Petitioner and two of his cousins—Carlos Gomez and Carmen Gomez—were at the Applebee's, along with others, when they attempted to leave without paying their bill.[2] (*Id.* at p. 1.) The victim,

[1] Subsequent undesignated statutory references are to the Code of Civil Procedure.

[2] We will refer to Carlos, Carmen and others whose last name is Gomez by their first names to avoid confusion. We intend no disrespect.

Pedro Zarate, confronted petitioner and Carlos outside the Applebee's. (*Ibid.*) Zarate was shot in the chest, but he survived. (*Ibid.*) Witnesses saw the shooter get into a truck driven by Carmen, which she then drove away.

The identity of the shooter was the central issue at trial, held in 2001. (*Ibid.*) Petitioner testified that Carlos shot Zarate. (*Ibid.*) Zarate denied petitioner was the shooter in his trial testimony, although Zarate had previously identified a photograph of petitioner as showing the shooter. (*Ibid.*) Various eyewitnesses testified either that petitioner shot Zarate, or that the shooter was wearing a red shirt, as was petitioner. One eyewitness—Emilio Zendejas—testified that the police had shown him two photographic lineups on the night of the shooting, and he was 80 to 90 percent certain that the shooter was the person in petitioner's photograph.

The jury convicted petitioner of attempted murder and assault with a firearm. The jury also found two enhancements true: that petitioner personally used a firearm causing great bodily injury (Pen. Code, § 12022.53, subd. (d)), and that he committed the crime for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b).) The trial court sentenced petitioner to 50 years in state prison.

On direct appeal, we affirmed the judgment. (*People v. Gomez, supra*, at p. 9.) This court found the trial court erred in excluding exculpatory evidence, but the error was harmless. (*Id.* at p. 3.) Specifically, the trial court erroneously excluded testimony by Ruben Gomez, the uncle of both petitioner and Carlos. At a hearing under Evidence Code section 402, Ruben had testified that Carlos admitted shooting Zarate, and that Carlos refused to turn himself in. (*Id.* at p. 2.) Ruben also testified that Carmen had told him that Carlos was in her truck before she drove away, and that Carlos had a gun. (*Id.* at p. 3.) Finally, Ruben testified that Carmen told his daughter that Carlos got into Carmen's truck after the shooting and told her to "go, go, go," while waving a gun,

whereupon Carmen drove away.[3] (*Id.* at p. 2.) This court found that the testimony should not have been excluded, but that the error was harmless because other witnesses—e.g., Zendejas—identified petitioner as the shooter. (*Id.* at pp. 4-5.)

B. *The Habeas Corpus Proceeding*

Petitioner subsequently filed a petition for a writ of habeas corpus in the trial court. Among other claims, he alleges the prosecutor at trial, then-Deputy District Attorney Pamela Ham (now Judge Pamela Butler), failed to produce exculpatory evidence in violation of *Brady*, *supra*, 373 U.S. 83. Specifically, in 2006, his habeas counsel obtained a videotape of police interviewing witness Zendejas on the night of the shooting. In the video, police showed Zendejas two "six-pack" photographic lineups, one including a photograph of petitioner. After Zendejas examined the photographs for about a minute, a detective asked Zendejas if he saw anybody familiar. Zendejas said he saw "two guys that may according to the body and color." Zendejas then pointed to a photograph in the lineup that did *not* contain petitioner's photograph, and stated, "This may be the guy, to me he seems the more closer." The detective then asked Zendejas, "[H]ow about the other lineup?" Zendejas pointed to petitioner's photograph, and said, "Number two, number two in the second lineup."

After examining the lineups further, Zendejas ruled out several other photographs. He pointed again to the first photograph he had identified—not that of petitioner—and stated, "but most likely, I remember the face, he had most, uh I, I remember seeing this face, it seemed like this face." Zendejas then identified the first photograph as the shooter, and he identified another photograph in the same lineup—again, not petitioner's photo—as the other person who was with the shooter. When the detective specifically pointed to petitioner's photograph and asked about it again, Zendejas referred back to the first photograph he had identified, and stated, "No, I, I have to say that no. 1 is more,

[3] Defendant called Carmen as a witness at trial, but she invoked her right to remain silent under the Fifth Amendment.

more of what I saw." He then ruled out petitioner's photograph by adding: "I know that the rest, the rest of the guys, they're different, totally different."

In his habeas petition, petitioner asserts the videotape evidence exculpates him because it shows Zendejas did not identify petitioner as the shooter, and it impeaches Zendejas' trial testimony that he was 80 to 90 percent certain petitioner was the shooter.

In June 2006, about five years after the jury trial, petitioner's trial counsel, Miguel Hernandez, submitted a declaration in support of the habeas petition stating that he had never seen the videotape until 2006, despite his pretrial discovery requests. On May 25, 2007, then-Deputy District Attorney Ham, who prosecuted petitioner at trial, filed a declaration in opposition to the habeas petition stating that she had provided the videotape to Hernandez in compliance with her discovery obligations. She submitted a second declaration on December 27, 2009, stating she had met with Hernandez the week before trial to ensure all discovery had been produced, and that Hernandez identified only one videotape—not the videotape of Zendejas—that had not been produced. She stated that the missing videotape was immediately duplicated and provided to Hernandez, and that she confirmed all other videotapes were provided. On December 30, 2009, she was sworn in as a judge in the Superior Court of Monterey County.

In May 2010, Hernandez filed another declaration specifically stating that then-Deputy District Attorney Ham never produced the videotape of Zendejas. With respect to the statements in her declarations that she provided the videotape to Hernandez, he stated "these factual assertions are inaccurate." Hernandez stated that his custom and practice when exchanging discovery with prosecutors included keeping records of what was exchanged and what remained outstanding. Furthermore, Hernandez stated that whenever then-Deputy District Attorney Ham produced discovery, she routinely attached a memorandum briefly describing and itemizing the discovery provided, e.g., "copy of

audiotape—Pedro Gomez 12-23-00."[4] Hernandez stated he had reviewed the correspondence between the parties and he received "no memoranda, receipts or any confirmatory writing" from the district attorney's office reflecting transmittal of the Zendejas videotape. Hernandez also denied having any discussions with then-Deputy District Attorney Ham in which he verified that he had received the Zendejas videotape.

On March 22, 2013, the Honorable Russell Scott ordered an evidentiary hearing on this and other claims, stating: "Because it is not clear whether the People failed to produce the videotape, or whether the People made the tape available and defense counsel failed to obtain it, there is an issue of fact that needs to be resolved before the court can render a decision concerning these two claims."

C. *The Petition for Recusal*

A little more than one month later, on April 30, 2013, petitioner filed a "Verified Petition to Recuse All Judges of the Monterey County Superior Court" in the trial court. As grounds for recusal, the petition cited section 170.1, subdivisions (a)(6)(A)(i) and (a)(6)(A)(iii). The petition was served by hand delivery to the Clerk of the Monterey County Superior Court with service copies for Judge Scott and the Presiding Judge, the Honorable Marla Anderson, "on behalf of all Judges of the Superior Court."

On May 13, 2013, in a 12-page order signed by both judges, the trial court ordered the petition denied and stricken on the basis that it was untimely and deficient on its face for failure to set forth grounds for disqualification. The court did not answer the petition or make any findings with respect to the supporting factual allegations.

[4] Hernandez's declaration states the memoranda are attached, but the copy of the declaration that defendant filed with his petition on appeal does not include these attachments.

On May 28, 2013, petitioner filed a "Petition for Writ of Mandate, Prohibition or Other Appropriate Relief" which this court summarily denied on August 1, 2013.[5] Petitioner then sought review in the California Supreme Court. On October 2, 2013, the Supreme Court granted the petition for review and transferred the matter back to this court with directions to vacate the order denying the petition and to issue an alternative writ. Accordingly, this court vacated its August 1, 2013 order and issued an alternative writ directing respondent court to (1) vacate its order denying petitioner's petition for recusal and grant the petition, or (2) show cause why this court should not issue a peremptory writ compelling these actions.

On November 11, 2013, respondent filed a return to the writ by demurrer alone, without answering the petition or addressing the merits of its claim. (See Cal. Rules of Court, rule 8.487 (b)(1).) The Attorney General, representing the People as the real party in interest, has taken no position on the petition.

## II. DISCUSSION

A. *Standard of Review*

Where the facts pertaining to recusal are not in dispute, we independently review the question of whether recusal is required in the interests of justice or because a person might reasonably entertain a doubt that the judge would be impartial. (*Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 171.) Because respondent proceeds by way of demurrer alone, we will adopt the facts as set forth in the petition. (*Estrin v. Superior Court* (1939) 14 Cal.2d 670, 672 [" 'The effect of the demurrer was to adopt as the return to the writ the facts alleged in the petition. [Citation.] The facts set forth in the petition are therefore uncontroverted.' "].)

[5] Petitioner also requests we take judicial notice of several pleadings and court orders filed in a similar recusal proceeding, referenced in *In re Bacigalupo* (2012) 55 Cal.4th 312, 316.) We hereby grant the request. (Evid. Code §§ 452, 459.)

B. *Procedural Contentions*

In the court below, respondent ordered the petition for recusal stricken on procedural grounds, including the ground that the petition was untimely filed. By demurrer in this court, respondent contends petitioner failed to adhere to the procedures outlined in section 170.3. Specifically, respondent argues that the statutory scheme does not allow petitioner to seek simultaneous recusal of all the judges of the court, and that judges are ethically prohibited from recusal in this fashion. In its demurrer, respondent expressed no opinion on the merits of the underlying grounds for recusal.

We conclude that petitioner filed his petition in a timely manner, but we agree with respondent that petitioner failed to adhere to the procedures outlined in section 170 et seq. insofar as the statutory scheme does not set forth procedural grounds for the simultaneous recusal of all of the judges of a superior court.

1. *Timeliness*

Respondent ordered the petition stricken because it was not timely filed. Respondent's order stated that the facts constituting the ground for disqualification were apparent by December 30, 2009, when Judge Butler was sworn in as a judge of the superior court, and after she had filed two declarations stating she had disclosed the videotape. Petitioner did not seek recusal until April 30, 2013.

Under section 170.3, a party seeking to recuse a judge must file a verified statement "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (§ 170.3, subd. (c)(1).) The purpose of the timeliness requirement is that untimely recusal should not " ' "permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." ' " (*People v. Scott* (1997) 15 Cal.4th 1188, 1207.)

The facts are undisputed that Judge Butler was sworn in as a judge of the superior court in December 2009, after filing two declarations stating she had disclosed the videotape. However, these facts alone were not sufficient to constitute a ground for disqualification. Petitioner's claim is that the ground for recusal here arises from the necessity for an evidentiary hearing in which the assigned judge would be required to assess a colleague's credibility. The trial court could have disposed of petitioner's claim without making any such credibility determinations. Once the trial court announced the need for an evidentiary hearing on March 22, 2013, petitioner filed his petition for recusal approximately one month later, on April 30, 2013. Furthermore, there is no evidence that petitioner deliberately delayed his filing "to play fast and loose with the administration of justice." (*People v. Scott*, *supra*, 15 Cal.4th at p. 1207.) Thus, we conclude the petition was filed in a timely manner.

2. *Simultaneous Disqualification of an Entire Bench*

Respondent court contends section 170.3 does not allow petitioner to seek simultaneous disqualification of all the judges of a superior court, and that no single judge has the authority to order the recusal of all judges of that court. In construing the statutory scheme, respondent relies on an opinion of the Judicial Ethics Committee of the California Judges Association concerning a presiding judge's authority to recuse all judges of a court. ("Ethical Limitations on Presiding Judge's Authority to Recuse the Entire Bench," Cal. Judges Assn., Jud. Ethics Com., Opn. No. 62 (2009) at p. 3, published in Rothman, Cal. Judicial Conduct Handbook.) The opinion concludes, "No single judge, even the presiding judge, may recuse an entire bench from hearing a case." Under this interpretation of the statute, the presiding judge would be required to allow each judge of the court to decide individually whether to recuse himself or herself. Furthermore, respondent contends this procedure requires petitioner to personally serve every judge on the court.

We agree. Sections 170.1 and 170.3 set forth grounds and procedures for the recusal of "*a* judge" or "*the* judge." (§ 170.1, subds. (a), (a)(6)(A)(i), & (a)(6)(A)(iii); § 170.3, subd. (c).)[6] (Italics added.) The statutes' use of language specifying "judge" in the singular implies that the Legislature intended to set forth procedural grounds for the recusal of an individual judge, not an entire bench. Nothing in the plain language of the statute sets forth a procedure to disqualify an entire bench, as petitioner attempted to do in the court below. However, the statutory scheme does not prohibit *voluntary* recusal by all the judges of a court. As stated by the Judicial Ethics Committee's opinion, "if the presiding judge wishes to declare that all the judges on the bench are disqualified, he/she may only do so by polling the individual members of the bench for their individual determinations." (Cal. Judges Assn., Jud. Ethics Com., Opn. No. 62, *supra*, at p. 3, published in Rothman, Cal. Judicial Conduct Handbook.) Similarly, respondent's demurrer in this proceedings notes that "the Presiding Judge could take the necessary steps to determine whether any judge of Respondent Court is qualified to hear Petitioner's case, which could include 'polling the individual members of the bench for their individual determinations' as to whether each of them is disqualified."

Accordingly, we will sustain respondent's demurrer on the grounds set forth above, and we will deny the petition for a writ of mandate without prejudice to the filing of a further statement of disqualification in the court below. We further conclude that

[6] Subdivision (a) of section 170.1 provides, in relevant part: "A judge shall be disqualified if any one or more of the following are true: [¶] . . .[¶] (6)(A) For any reason: (i) The judge believes his or her recusal would further the interests of justice. [¶] . . . [¶] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Subdivision (c)(1) of 170.3 provides, in relevant part: "If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge."

nothing in the statutes governing disqualification prohibits the judges of the superior court from voluntarily recusing themselves.

## III. DISPOSITION

Respondent's demurrer is sustained and petitioner's writ of mandate is denied without prejudice to the filing in the superior court of a statement of disqualification of the individual judge assigned to adjudicate petitioner's habeas petition claim under *Brady*, *supra*, 373 U.S. 83.

_____
Márquez, J.

WE CONCUR:

_____
Premo, Acting P.J.

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Bamattre-Manoukian, J.